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ALERT

Supreme Court to Review Circuit Split over FCA Statute of Limitations

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WHAT: The U.S. Supreme Court will review application of the False Claims Act's statute of limitations tolling provision (permitting suit up to 10 years) in *qui tam* actions where the Government declines to intervene, potentially resolving a three-way circuit split.

WHEN: The Court granted certiorari on November 16, 2018.

WHAT DOES IT MEAN FOR INDUSTRY: Under the False Claims Act (FCA), there are two statutes of limitations: (1) six years after the date of the violation or (2) three years after the date on which the responsible Government official learned or should have known of the relevant facts underlying the claim, but in no event more than ten years after the violation. Last week, the Supreme Court announced that it would review an Eleventh Circuit FCA decision that deepened the existing debate over the application of the tolling provision of the statute of limitations in these high-stakes matters. By granting cert in this matter, the Court has the opportunity to give much-needed certainty to those who regularly do business with the Government by resolving a three-way circuit split over a key issue—***just how long can a relator wait to bring an action for fraud when the Government has not intervened?***

In *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1083 (11th Cir. 2018), the relator filed a *qui tam* action against The Parsons Corporation and Cochise Consultancy, Inc. for allegedly submitting false claims to the U.S. Department of Defense related to a contract to clear excess munitions in Iraq. The district court determined that the statute of limitations had expired. The relator had filed his action more than six years after the date of the alleged violation but within three years after he disclosed the violation to the

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Government. The district court held that the three-year statute of limitations does not apply in *qui tam* actions in which the Government has declined to intervene and dismissed the case.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit reversed, holding that the three-year limitations period applies even where the Government declines to intervene. The Eleventh Circuit further held that "this period begins to run when the relevant federal government official learns of the facts giving rise to the claim, when the relator learned of the fraud is immaterial for statute of limitations purposes." Under the Eleventh Circuit's interpretation of the FCA, a relator may file a claim within three years of the date on which the Government first knows or should know of the alleged fraud—even if the relator has known of the alleged violation for much longer—as long as the filing occurs within ten years of the violation.

The Eleventh Circuit's decision sets up a three-way split among the federal circuit courts. The Fourth, Fifth, and Tenth Circuits hold that a *qui tam* relator cannot take advantage of the three-year statute of limitations period if the Government does not intervene in the action. *See United States ex rel. Sanders v. North American Bus Industries, Inc.*, 546 F.3d 288 (4th Cir. 2008); *United States ex rel. Erskine v. Baker*, 213 F.3d 638, 2000 WL 554644 (5th Cir. 2000); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702 (10th Cir. 2006). Those Courts maintain that Congress must have intended for the three-year period to apply only to the Government, as it relies on the Government's knowledge of the facts supporting a claim for relief.

The Third and Ninth Circuits do permit a *qui tam* relator to use the three-year statute of limitations but hold that the limitations period begins to run when the relator, not the Government, knows or should know of the facts underlying the alleged fraud. *See United States ex rel. Malloy v. Telephonics Corp.*, 68 F. App'x 270 (3d Cir. 2003); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996). The Ninth Circuit reasoned that nothing in the FCA statute of limitations "differentiates between private and government plaintiffs at all" and explained that *qui tam* relators "are merely agents suing on behalf of the government." But acknowledging that tolling provisions are meant to trigger the statute of limitations once the *plaintiff* learns of the facts supporting its claim, the Ninth Circuit held that where the Government is not a plaintiff the three-year period must be triggered by the relator's knowledge, not that of the Government.

The Eleventh Circuit rejected both of these existing interpretations of the FCA's statute of limitations in permitting the *Cochise Consultancy* relator to proceed. Had the relator in that case brought his claim in any of the other five circuits that have addressed this issue, his claims would have been time barred. Recognizing that this multi-prong circuit split allows relators to forum-shop for the jurisdiction with the most advantageous statute of limitations, the defendants petitioned the Supreme Court to review the case and implement a uniform standard. The petition for cert is available here.

In reviewing the Eleventh Circuit's decision, the Supreme Court has an opportunity to ensure that relators are encouraged to report violations as soon as possible. If they are permitted to toll the statute of limitations based on the Government's knowledge, relators could instead be incentivized to conceal their knowledge from the Government to game the system and wait for a larger recovery if the performance is on-going. Of course, that path is also risky for a realtor if another whistleblower files first, leading to a possible dismissal under the first to file rule.

While it remains to be seen how the Supreme Court will come out on the merits of this case, its decision to grant cert is good news for those who regularly do business with the Government. The decision to grant cert is another clear indication that this Court is inclined to take cases where circuit splits create forum-shopping opportunities. The FCA's broad venue provision means that defendants could be hauled into almost any court in the country. Having circuits take such differing positions with respect to statutes of limitations creates a great deal of uncertainty for businesses who contract with the Government—particularly those that have investigated and self-reported potential issues and would like to move on and close out contracts. While uncertainty is never a good thing, it is particularly harmful when the FCA is implicated given the possibility of treble damages and statutory penalties. This may be why the court has averaged approximately one FCA case a year over the last decade. Whichever way the Court rules, the resolution of this case will likely provide much-needed clarity for potential defendants and curtail opportunistic forum-shopping by relators.